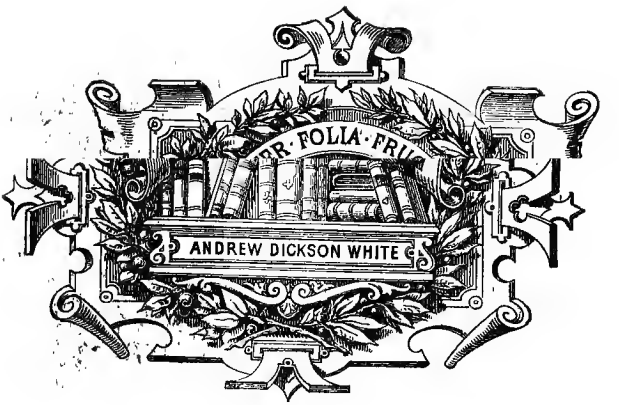
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TWO INTRODUCTORY LECTURES

ON THE

SCIENCE

OF

INTERNATIONAL LAW.

BY

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Upon the general theory of the Law of Nations, much has been written by authors of great name and ability. Upon practical questions much has been laid down by those distinguished civilians, who have adorned the British and American Courts of Admiralty, and whose masterly judgments, full of wisdom and learning, are the most perfect expositions of the best and purest principles of that law. It has been attempted, in the following lectures, to pass briefly in review both series of authorities, and to note the chief characteristics of the most eminent amongst them, with a view to make them known to the student, and not with any pretence to novelty of view or originality of treatment. On the contrary, the materials supplied by others have been freely used, where the doctrine appeared to be sound, or the criticism just. There is little, therefore, in the following pages calculated to satisfy the wants of the scholar or of the publicist; but they may be useful

to the student in guiding him to the best sources and in thereby enabling him to draw knowledge from the fountain head. Of all human sciences, the law is probably not the last to which the precept strictly applies, "melius est haurire fontes, quam consectari rivulos."

Doctors' Commons,
Dec. 26. 1855.

LECTURES

ON

INTERNATIONAL LAW.

LECTURE I.

International Law a Science of Modern Growth. — Law of Nations not identical with the Jus Gentium of the Romans. — Institutes of Gaius. — Institutes of the Emperor Justinian. — Cicero. — The Fetial Law. — Authority of the Holy See as Supreme Umpire between Temporal Sovereigns. — Reaction against the Papal Donation of the Indies. — Franciscus à Victoria and Dominicus Soto, the Pioneers of the New Doctrine. — Balthasar Ayala, the First Systematic Teacher. — Suarez of Granada; earliest Recognition of an Usage amongst Nations. — Albericus Gentilis the Precursor of Grotius. — Maritime Law. — Consolato del Mare. — Roles d'Oleron. — Laws of Wisby. — Code of the Hanse League. — Era of Grotius. — His Treatise on the Right of War and Peace. — Its wide-spread Influence. — Its subject more extensive than its Title. — Method of Treatment. — Contents of the Work. — Opposition to its Acceptance, both in England and in France. — Antagonism of Selden. — Unfavourable Criticisms of Rousseau, Paley, Jeremy Bentham, Dugald Stewart. — Favourable Judgments of Adam Smith, Sir James Mackintosh, Mr. Hallam, and Dr. Whewell.

THE Science of International Law, like the science of Political Economy, is a fabric of comparatively modern structure. Much, which bears upon the subject, is probably to be discovered in the writings of the scholastic jurists of the fourteenth and fifteenth

centuries; but the true era from which we must date the foundation of the great science, which is conversant with questions of right that concern the fellowship of nations, is the latter portion of the fifteenth century, one of the most remarkable epochs in the annals of legal science. This period has been appropriately termed by the Jesuit Andrês "the Golden Age of Jurisprudence;" and it is distinguished not merely by the completion, under the masterly hand of Cujacius, of the important work, which Alciatus of Milan had commenced in the preceding generation, of emancipating the Roman law from the verbal subtleties of the scholastic philosophy and the conflicting glosses of the earlier commentators, but also by the first systematic enunciation of rules, to which the intercourse of independent nations should be amenable.

No writer had hitherto treated expressly of that branch of jurisprudence, which was formally expounded in the following century under the novel head of the Law of Nations and of Nature. For the Law of Nations, in the received sense of the term, was in a great measure unknown to antiquity, and is not to be confounded with the Jus Gentium of the Roman Law. The Jus Gentium of the Romans was not a body of rules regulating the mutual intercourse of nations, but was that portion of Natural Law to which all mankind does homage, the least as feeling its beneficence, the greatest as not exempt from its control, and which has accordingly been incorporated into the domestic code of every nation. The earliest formal definition of this branch of law is to be found in the Institutes of Gaius, which were restored to light by the researches of Niebuhr within the last half century from amidst the archives of the Chapter

Library in Verona; and that definition seems to have been approved, as it was adopted, by the compilers of the Institutes of the Emperor Justinian.

"Quod naturalis ratio inter omnes homines constituit, id apud omnes populos peræque custoditur, vocaturque Jus Gentium, quasi quo jure omnes gentes utuntur; et populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur." — *Inst.* l. I. tit. II. § 1.

This formal definition harmonises in substance with the view of Cicero, who contrasts the *Jus Gentium*, which is common to all mankind as rational beings, with the *leges populorum*, or those rules of municipal jurisprudence which are special to each state, and which correspond to the *Jus Civile* of the Institutes. "Neque vero hoc solum naturâ, *i.e.* jure gentium, sed etiam legibus populorum, quibus in singulis civitatibus respublicæ continentur, eodem modo constitutum est, ut non liceat sui commodi causâ nocere alicui,"—(*Off.* l. III. c. 5.) We must not, however, suppose that the Romans had not at any time any definite notions of international law. The Collegium Fetialium was not a mere heralds' college. It was the duty of that body to act as ambassadors as well as heralds, to advise the state in negotiations of peace or alliance, and to regulate the general intercourse of Rome with foreign nations. Niebuhr expressly styles them judges of international law; and there can be no doubt that they committed their decisions and forms of proceeding to writing, and thus constituted a written body of Fetial Law. We find Cicero accordingly justifying the formal surrender of Regulus, on the part of the Roman Senate, to the Carthaginians, on the ground that the war with the Carthaginians was a war with a rightful and lawful

enemy, with regard to whom the whole Fetial Law was in force, and there were many duties and rights in common.

"Cum justo enim et legitimo hoste res gerebatur, adversus quem et totum jus fetiale, et multa sunt jura communia. Quod ni ita esset, nunquam claros viros senatus vinctos hostibus dedidisset."— *Off.* l. III. c. 29.

The institution, however, of the Fetiales naturally fell into decay with the rapid extension of the Roman dominion. Rules of international conduct based upon reciprocity, had been lost sight of by the Roman people long before the Republic had established its supremacy throughout the Italian peninsula, and the universal empire of the Cæsars left no place, as it furnished no occasion, for the application of any such rules.

When the Roman laws, therefore, such as they subsisted at the dismemberment of the Western Empire in the fifth century, were received in the several kingdoms of the Gothic, Lombard, and Carlovingian dynasties, they did not supply them with any explicit rules for the adjudication of questions of right between independent states or nations. Theological casuistry, however, was from time to time applied to the duties of the sovereigns; analogies of positive law were frequently invoked; and the Civilians, as being conversant with the most widely diffused system, took into their hands the adjudication of questions of public law. The doctors, for instance, of the famous school of Bologna had been called upon, from a very early period, to furnish arbitrators in the ever recurring disputes of the Italian Republics, and to supply jurists to direct the diplomacy of the Lombard cities in their contests with the German

emperors; and where the analogy of positive or local law failed to supply a rule, or the gravity of the question demanded a more authoritative sanction, religion, in the person of the spiritual chief of the Western Church, was appealed to as supreme umpire, and a General Council had not unfrequently played the part of an European congress, and, by the side of ecclesiastical matters, regulated the temporal affairs of princes.

The geographical discoveries, however, which had marked the close of the fifteenth century, were calculated to give rise to a number of novel questions, and to awaken a conflict of claims requiring more than ever some settled standard of public law, as a rule of reference, whilst the religious revolution, which followed closely in the track of those discoveries, shook the authority of the canon law, one of the main pillars of European jurisprudence, and at the same time indisposed an influential portion of the civilised world to acknowledge any longer the Holy See as the oracle of the unwritten law, which should govern their international relations.

The authority of the Roman Pontiff, as the supreme arbitrator in temporal questions between states and princes, may be said to have reached its culminating point, when the Spaniards and the Portuguese referred to his decision their dispute as to the monopoly of the discovery of the sea-passage to the Indies, and compromised their quarrel by a partition of the New World into East and West. Alexander VI., who at that time occupied the papal chair, did not hesitate to sanction by a formal Bull this monstrous settlement, under the pretext of sending the soldiers of the Cross into the lands of the heathen. An imaginary line drawn from pole to pole was henceforth to

serve as a boundary between the territorial acquisitions of the two nations, who claimed to appropriate to themselves not merely the vast continents and numerous islands of the Indian seas, but even the extensive surface of ocean which divided them from the known parts of the world, and likewise the races of people who might be found to inhabit them.

The scandal given by this extreme stretch of authority on the part of the See of Rome, coupled with the cruel and rapacious abuse of the Papal Donation by the Spaniards, provoked a champion from amongst the ranks of theological casuists to step forth in behalf of the native inhabitants of the newly discovered countries. It is to the honour of the Dominican Order, that one of their members was the first to protest against the asserted right of the Pope to grant away the lands of heathen nations to Christian princes. Franciscus à Victoria, a Dominican monk, began to teach at Valladolid in 1525, and subsequently as professor in the university of Salamanca. His doctrine may be gathered from a series of thirteen dissertations, published for the first time at Lyons in 1557, and entitled Relectiones Theologicæ, a book of remarkable scarcity, although it passed through four editions. The fifth of these dissertations entitled "De Indis," treated of the title of the Spaniards to the possession of the new world; and the sixth "De Jure Belli" discussed exclusively the right of war. In the former dissertation, Victoria maintained the right of the Indians to the exclusive dominion over their own country, and confronted directly the doctrine of Bartolus and the Bolognese school of jurists, that the Pope had the power of conferring on the kings of Spain the dominion over countries inhabited by pagan barbarians. This would have been too bold a thesis

in those days to maintain absolutely without suggesting an alternative. Accordingly he contended that the rights of the Spaniards were based on what he termed the right of natural society, which entitled them to seek to establish and carry on an innocent trade with the Indians, the rejection of which on their part would justify a declaration of war against them, and might lead to the conquest of their country. He did not, however, hesitate to pronounce it to be wrong to deprive the Indians of their independence, either on the ground that they were sinners, or on the ground that they were pagans. "Indis non debere auferri imperium, ideo quia sunt peccatores, vel ideo quia non sunt Christiani." The sixth dissertation, on the right of war, treats most of the questions subsequently discussed by Albericus Gentilis and Grotius, and breathes an intrepid spirit of justice and humanity, the characteristic of the Spanish theologians, which was transmitted to Dominicus Soto, the pupil and successor of Victoria, and who deserves, equally with his master, to live in the recollection of posterity. Soto, who was also a member of the Dominican Order, was the confessor of the Emperor Charles V. and the oracle of the council of Trent, to whom that assembly was indebted for much of the precision and even elegance for which its doctrinal decrees are not unjustly commended. He was the authority consulted by Charles V. on occasion of the conference held before him at Valladolid in 1542 between Sepulveda, the advocate of the Spanish colonists, who maintained that the conquest of the Indies from the natives was lawful, and Bartholomew Las Casas, the bishop of Chiapa, who contended that such conquest was unlawful, tyrannical, and unjust. The opinion of Soto may be gathered from the excellent principle laid down in his treatise on justice and law,

dedicated to Don Carlos, that there can be no difference between Christians and pagans, for the law of nations is equal to all nations. "Neque discrepantia (ut reor) est inter Christianos et Infideles, quoniam jus gentium cunctis gentibus æquale est." To Soto belongs the signal honour of being the first who condemned the African slave trade. "It is affirmed," says he, "that the unhappy Æthiopians are by fraud or by force carried away and sold as slaves. If this be true, neither those who have taken them, nor those who have purchased them, nor those who hold them in bondage can ever have a quiet conscience, until they have emancipated them, even if they should obtain no compensation.

It is difficult for us, in the present age, to measure the degree of courage and noble principle which impelled these excellent monks to vindicate the rights of the oppressed against the authority of the Church, the ambition of the Crown, the avarice and pride of their countrymen, and the prejudices of their own Order.

These were the early streaks of dawn, the earnest of the coming day. The maritime discoveries of the fifteenth and sixteenth centuries had given an extraordinary impulse to international intercourse; and the frequency of wars, though it did not create a common standard of jurisprudence by which military and maritime questions could be regulated, showed how much such a standard was required. War itself, it was perceived, even for the advantage of the belligerents, had its rules; an enemy had his rights; there were also distinct questions relating to alliance and neutrality; and a customary code had grown up by degrees to be administered with something like precision, in matters to which no state could apply its particular jurisprudence with any hope of reciprocity.

It was to be expected, perhaps, that the systematic reduction of the practice of nations in the conduct of war to legitimate rules should emanate from the camp rather than from the cloister. Accordingly we find a treatise by Balthasar Ayala, the judge advocate of the Spanish army in the Netherlands, dedicated in 1581 to the Prince of Parma, under whom he served. To this work we may refer, as the opening of a great subject on a basis strictly within the province of international jurisprudence, and disconnected from theological casuistry.

Ayala lays down the general principles upon which the right of hostilities rests, without subtlety or chicanery. Victoria had maintained that necessity alone can justify a declaration of war, and that when war has been declared for a just cause, it should be carried on, not with a view to destroy the enemy, but in order to secure a durable peace. Ayala proceeds to show that a war is just which is undertaken for the defence of a state, its subjects, its property, or its allies, or for the recovery of what has been carried off by an enemy; and Mr. Hallam has observed, with good reason, that Grotius, who refers to Ayala with commendation, is mistaken in saying that Ayala has not touched the grounds of justice and injustice in war. "Causas, unde bellum justum aut injustum dicitur, Ayala non tetigit." (*Prolegomena*, § 38.) Ayala, with Victoria, explicitly denied the right of levying war against infidels, even by the authority of the Pope, on the mere ground of religion, as their infidelity did not deprive them of the right of dominion, which they possess by the law of nations.

Allusion has been already made to the influence of the Reformation upon the system of European jurisprudence. It had been the habit of publicists, ante-

cedently to that event, to invoke the authority of canonists equally as of the old Roman jurisconsults; and whilst the entire brotherhood of European princes acknowledged one and the same spiritual chief, his authority was binding upon their consciences, and his interference on critical occasions was as necesary as it was acceptable. The prerogative, however, of the Holy See in such matters had been strained too far. Catholic divines had impugned it in theory; Protestant princes were not likely to respect it in practice. Accordingly, we find that Queen Elizabeth of England, when Mendoza, the Spanish ambassador, remonstrated against the expedition of Francis Drake, replied that she did not understand why either her subjects, or those of any other European prince, should be debarred from traffic in the Indies; that as she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of. — (*Camden's Annals*, anno 1580.)

The chain which links together the casuistic theology of the Schoolmen with the particular jurisprudence that relates to the intercourse of nations, would not have been complete without the work of Suarez of Granada, one of the greatest men in the department of ethical science, whom the Society of Loyola has produced. Having discussed the principles of natural law and of positive jurisprudence in a very systematic manner, and with an acuteness which led Grotius to pronounce him to be so subtle a philosopher and theologian as almost to be without an equal, "tantæ subtilitatis philosophum et theologum, ut vix quemquam habeat parem," Suarez proceeds to discuss those larger principles of jurisprudence which connect that science with general morals, and espe-

cially such as relate to the intercourse of nations. He was the first to point out that the intercourse of independent states was regulated not merely by principles of natural law, but by usages long observed and uniformly acted upon. "Nunquam enim civitates sunt sibi tam sufficientes, quin indigeant mutuo juvamine et societate, interdum ad majorem utilitatem, interdum ob necessitatem moralem. Hac igitur ratione indigent aliquo jure quo dirigantur et recte ordinentur in hoc genere societatis. Et quamvis magna ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediate quoad omnia, ideoque specialia jura poterant *usu earundem gentium introduci*," (Suarez, *de Legibus*, c. II. l. II. § 9. et seq.) This is the first recognition of an usage or *consuetudo* amongst nations, which was binding as a rule of intercourse amongst them; and upon this subject the views of Suarez were more definite and more clear than those of his contemporary, Albericus Gentilis, the last of the pioneers of juridical science, whose works it will be necessary to notice on the present occasion, and whose labours contributed to clear the way for Grotius.

Whilst Mr. Hallam is disposed to consider the treatise of Ayala as the first book that systematically reduced the practice of nations in the conduct of war to legitimate rules, Lampredi, a very competent judge, claims for his fellow-countryman Albericus Gentilis the honour of being entitled the father of the modern science of Public Law. Gentilis was a native of Ancona. His father, having adopted the Reformed Faith, found himself obliged to leave his native country and to remove with his family into Germany. He thereupon sent his son Alberic into England, where, through the favour of the Earl of

Leicester, he was promoted to the chair of Civil Law in the university of Oxford. His writings on Roman jurisprudence are numerous; and his treatise on the law of embassy was dedicated to Sir Philip Sidney. His attention, however, was more especially directed to questions of international law, by the circumstance of his being the advocate of the Spanish embassy before the Prize Court in London; and his treatise entitled "Advocationes Hispanicæ" may be regarded as the earliest collection of judicial decisions on the maritime Law of Nations. His most remarkable work was a Treatise on the Right of War, published in 1589, and dedicated to Lord Essex, and to which work Grotius was indebted in a greater degree than to that of Ayala. Grotius himself acknowledges his obligation, both directly in the Prolegomena to his great work, and indirectly by adopting almost precisely the same order and division of subjects in his first and third books, as Gentilis had sketched out. Gentilis, it must be admitted, had ranged over the whole field of public faith, and discussed the rights both of war and victory; but he had only set up the framework, whilst Grotius constructed a complete edifice; and where the heading of many chapters in both writers is the same, it will be found that Grotius enters more deeply into the subject, and reasons much more from principles, whilst he relies less on the authority of mere precedent or of legal opinions, not a few of which, he observes, are adopted to suit the interest of those who consult the framers of them; in a word, to use Mr. Hallam's vigorous language, Grotius in almost every chapter is a philosopher, where Gentilis is a compiler.

It is not proposed on the present occasion to in-

stitute any examination of the various collections of rules, by which questions of maritime law had come to be regulated between individual members of different political communities, such as the Consolato del Mare, which was a manual of maritime law for traders in the ports of Spain and Italy, the Roles or Jugemens d'Oleron, which form the substance of the Black Book of the British Admiralty, the Laws Maritime of Wisby, which prevailed in many ports of the Baltic, and the Code of the Hanse League; I merely allude to them thus briefly, lest I should be supposed to have overlooked their existence in connection with a department of the law of nations. They were certainly most important contributions to the maritime branch of that law; and whilst the intercourse of nations was confined to maritime commerce they supplied rules, founded upon usage, to meet the necessities of the questions which had hitherto arisen, or were thought likely to arise. Their great value was, that they cast into a permanent type and placed on record the usage of nations in certain matters, and brought mankind to respect that general usage as constituting a rule to which individuals, without respect to nationalities, were required to conform. They practically prepared the way for the admission of the legal doctrine which Hooker had foreshadowed in the first book of his Ecclesiastical Polity. "The Law of Nations," he writes is a third kind of law, which toucheth all such several bodies political, so far forth as one of them hath public commerce with another. The strength and virtue of that law is such that no particular nation can prejudice the same by any their several laws and ordinances, more than a man by his private resolutions the laws

of the whole commonwealth or state in which he liveth. For as civil law, being the act of the whole body politic, doth overrule each several part of the same body, so there is no reason that any one commonwealth of itself should, to the prejudice of another, annihilate that *whereupon the whole world has agreed.*"

It is acknowledged by every one, in the language of Mr. Hallam, one of the latest and ablest of the numerous writers who have discussed the merits of the treatise of Grotius on the Right of War and Peace, that the publication of this work marked an epoch in the philosophical, and it may be said, in the political history of Europe. According to one of the letters of Grotius to Gassendi, quoted by Stewart, and alluded to by Barbeyrac, the scheme was suggested to him by Peirescius. Sir James Mackintosh couples with Peirescius the name of our great countryman Lord Bacon, as having by his advice contributed to the undertaking of so arduous a task. "It may be reckoned," writes Mr. Hallam, "as a proof of the extraordinary diligence as well as quickness of parts which distinguished this writer, that it occupied a very short part of his life. He first mentions it in a letter to the younger Thuanus in August 1623, that he was employed in examining the principal questions which belong to the Law of Nations. In the same year he recommends the study of that law to another of his correspondents in terms which denote his own attention to it." The work itself was published in Paris two years later, in 1625. It had been composed by its illustrious author in the house of the President de Mesmes near Senlis in France, whither he had retired on his escape from the fortress of Louvestein. The story of his wife's devotion and

successful exertions in procuring his escape is well known. He had been distinguished in his own country as a statesman and a philosophical lawyer; he was almost equally celebrated as an historian and a divine. Having entered warmly into the controversy between the Arminians and the Gomarists, he was involved in the misfortunes of the pensionary Barnevelt, and of the Arminian party; and the philosopher of Delft, after the execution of his political chief, was in 1619 condemned to perpetual imprisonment.

The horrors of the civil war which had desolated his country, brought home to his attention the cruelty and injustice of which, to use his own words, even barbarians might be ashamed. War was declared upon the slightest pretext, or without any pretext at all; and when arms were once taken up, all reverence for laws human or divine was laid aside, as if an edict had been published for the commission of every act of crime. Videbam per Christianum orbem vel barbaris gentibus pudendam bellandi licentiam, levibus aut nullis de causis ad arma procurri, quibus semel sumtis nullam juris divini, nullam humani juris reverentiam, plane quasi uno edicto ad omnia scelera emisso furore. (*Prolegomena*, § 28.)

Grotius had entered his prison with the prospect of perpetual seclusion from the active duties of a citizen, and in this respect his exile in a foreign land made no change in his condition; so that the political repose which was forced upon him by his exile, gave him an opportunity to mature his views and cultivate, in the interest of his fellow-men at large, the noblest part of jurisprudence, that which is conversant with questions touching the universal fellowship of the human race.

"Having practised jurisprudence in public in my own country, with all possible integrity" (such are his own modest words), "I would now, in what remains to me, undeservedly banished from that country, graced by so many of my labours, promote the same subject, jurisprudence, by my private studies."

The public reputation of the author was thus of itself not unlikely to attract attention to any work which came from his pen. Another circumstance should not be overlooked,—that a school of divines, amongst whom Erasmus was conspicuous, had declared all war to be unlawful, with a similar object, perhaps, to that with which, when a rod has been twisted in one direction, men bend it forcibly in another, under the hope of making it become straight. A writer, therefore, who undertook to moderate, not to interdict, the use of arms, and who sought to mitigate the practice of warfare, whilst he admitted the necessity of war itself, and its lawfulness when it was necessary, would be readily welcomed by statesmen, who were anxious to provide a remedy for the licence which permitted everything in war.

I have observed that the writings of Grotius form an epoch in the political history of Europe. The extraordinary influence which they exercised may be doubted by those who are unacquainted with the disputes of the seventeenth century. His treatise, De Jure Pacis et Belli, was published at Paris in 1625. It was dedicated to Louis XIII. of France. Its appearance worked a positive revolution in the political conduct of princes and statesmen. Mr. Hallam observes that "it may be considered as nearly original in its general platform as any work of man in an advanced state of civilisation and learning. It is more so,

perhaps, than those of Montesquieu and Smith." I should myself be disposed to place it above the writings of Montesquieu, but should be content to see it take rank with the great work of Adam Smith, "On the Wealth of Nations."

"Those who sought a guide to their own consciences, or to that of others, those who dispensed justice, those who appealed to the public sense of right in the intercourse of nations, had recourse to its copious pages for what might guide or justify their conduct." Numerous editions of the work circulated rapidly throughout Europe. Written originally in Latin, it was speedily translated into various languages. Jurists of note did not hesitate to publish annotations and commentaries upon it; and so numerous were the former, that the work itself during the author's life was edited *cum notis variorum*, a distinction hitherto confined to the ancient classics.

King Gustavus Adolphus of Sweden is said to have found so much satisfaction in the perusal of the treatise of Grotius, that he slept with it under the pillow of his camp-bed during the Thirty Years War; and his admiration for its author determined him to retain him in his service. The Chancellor Oxenstiern carried out the wishes of that monarch, after his untimely death at Lützen, by sending Grotius, as the ambassador of Sweden, to the court of Louis XIII.

Such success, however, could not be achieved without great opposition; and parties were everywhere arrayed against the doctrines of the new school. To such a height did prejudice and established habit carry learned men, that, as Barbeyrac informs us, it was seriously contended by the opponents of the Grotians,—for his supporters were so stigmatised,—that its maxims went to destroy the three cardinal

principles of the Civil Law, to wit, "Honeste vivere, neminem lædere, suum cuique tribuere."

Within thirty or forty years, however, the work of Grotius was generally received as authority in the Continental universities, and deemed to be a requisite preparation for the student of civil law, at least in the Protestant countries of Europe, for it should be mentioned that it was soon placed by the Roman censors in the Index. In 1656, it was taught in the university of Wurtemburg as public law; and in 1661, the Elector Palatine set the example of founding a chair of the Law of Nature and Nations in the university of Heidelberg, the occupant of which was expressly directed to expound the writings of Grotius, — much in the same manner as the chair of Political Economy in the university of Cambridge, has been founded within recent memory expressly for the discussion of the doctrines of Adam Smith.

The subject of the work of Grotius was, as may readily be supposed, far more extensive than the title. Under the modest pretext of discussing the rights of war and peace, he ventured to lead his readers out of the beaten path, and to teach them that there was a law distinct from the Law of Nature, or the Jus Gentium of the Roman system, which was common to all or most nations, which had been tacitly acted upon and generally received by common consent, and which was for the advantage not of one body in particular, but of all in general. To this law Grotius gave, for the first time, the name of "the Law of Nations" by way of distinction from "the Law of Nature;" not that Grotius thereby intended to deny the application of the great principles of natural law to the relations between commonwealths; on the contrary, he expressly declared it to be for the

interest of mankind that the law which is common to many nations, whether derived from nature, or instituted by divine command, or introduced by tacit consent and established by custom, should be treated of universally and methodically; but he wished more especially to reduce into a system the rules of intercourse which were practised between nations, instead of leaving the whole fabric to rest on general principles, the application of which might be maintained or denied by each nation in its transactions with its neighbours, according as it suited its convenience, or as the occasion might seem to warrant.

"I have employed," he says, "by way of evidence of the existence of this law, the testimonies of philosophers, historians, poets, and in the last place, orators, not that implicit credit is to be given to them, for it is usual for them to serve their party, or their subject, or their cause, but because when many persons at different times and in different places affirm the same thing for certain, that circumstance ought to be ascribed to some general cause, which in the questions treated by us cannot be any other than a correct inference from some natural principles, or an universal consent. The former of these indicates the Law of Nature, the latter the Law of Nations, the difference between which must not be judged of from the language of their testimonies, for writers everywhere confound the terms 'law of nature' and 'law of nations,' but from the quality of the subject matter. For whatever cannot be deduced by clear reasoning from certain principles, and yet appears to be everywhere observed, must have had its origin in the free consent of all." (*Prolegomena*, § 41.)

I do not profess, upon the present occasion, to enter into any minute examination of the mode in which Grotius executed his task. The work consists of three books. To use his own language, in the first book he has examined the general question whether any war is just ; next, in order to distinguish between public and private war, he has explained the nature of sovereignty, what peoples, what kings, have it in full, what in part, what with a right of alienation, what otherwise; and afterwards he has spoken of the duty of subjects to their sovereigns.

In the second book, he undertakes to explain all the causes from which war may arise, and he examines what things are in common, what are property, what are the rights of persons over persons, what obligation arises from dominion, what is the rule of royal succession, what rights are obtained by covenant or contract, what is the force and interpretation of treaties and alliances, what of oaths public and private, what compensation is due for damage done, what is the sacred character of ambassadors, what the right of burying the dead, what the nature of punishments.

In the third book, he discusses in the first place what is lawful in war, and, after making a distinction between those acts which may be done with impunity, or may even, in dealing with foreigners, be defended as consistent with right, and those acts which are really free from fault, he descends to the different kinds of peace, and to the variety of conventions in war. (*Prolegomena*, §§ 34, 35, 36.)

Such is the account of his work, which Grotius gives in the Prolegomena. To those who wish to become more intimately acquainted with the details of his system, I would suggest the perusal of the

very full and able analysis which is to be found in the third volume of Mr. Hallam's "History of the Literature of Europe."

I have already alluded to the opposition which the treatise de Jure Belli et Pacis experienced during the lifetime of its author. Such a result was, perhaps, to be expected; error does not readily give way to truth. In England, indeed, the influence of Grotius was more slowly extended, and was ultimately much less general than on the continent of Europe. The peculiarity of our laws and some other reasons readily suggest themselves in explanation of this fact. Amongst other causes, some weight may be given to the controversy which Selden maintained in his Mare Clausum, composed as an answer to the treatise of Grotius de Mari Libero, which latter work was calculated to awaken a prejudice amongst Englishmen against anything else which came from the pen of its author. But it was hardly to be expected, that the new school of philosophy which sprang up in France in the eighteenth century, should have ventured to treat the work with contempt, and its author with contumely. When a book is little read it is easily misrepresented; and Rousseau, in his Contrât Social, has not hesitated to insinuate that Grotius confounds the fact with the right, and the duties of nations with their practice.

In our own country there have not been wanting writers who have assailed his style, or objected to his method. Paley, in his Moral Philosophy, finds fault with Grotius for quoting the opinions of poets and orators, of historians and philosophers, as authorities from whom there is no appeal. From this charge Sir James Mackintosh has amply vindicated

the philosopher of Delft, and pointed out that he professedly invokes the writers of by-gone days, not as judges who have decided, but as witnesses who may assist the judgment of the reader.

"He quotes them, as he tells us himself, as witnesses whose conspiring testimony, mightily strengthened and confirmed by their discordance on almost every other subject, is a conclusive proof of the unanimity of the whole human race on the great rules of duty and the fundamental principles of morals. On such matters poets and orators are the most unexceptionable of all witnesses; for they address themselves to the general feelings and sympathies of mankind, and they are neither warped by system, nor perverted by sophistry. They can attain none of their objects,—they can neither please nor pursuade, — if they dwell on moral sentiments not in unison with those of their readers. No system of moral philosophy can surely disregard the general feelings of human nature and the according judgment of all ages and nations. But where are these feelings and that judgment recorded and preserved? In those very writings which Grotius is gravely blamed for having quoted. The usages and laws of nations, the events of history, the opinions of philosophers, the sentiments of orators and poets, as well as the observation of common life, are in truth the materials out of which the science of morality is formed; and those who neglect them are justly chargeable with a vain attempt to philosophise without regard to fact and experience, the sole foundation of all true philosophy."

The passage in Grotius, which has suggested this defence, is found in the Prolegomena, where Grotius says: —

"The sentences of poets and orators have less weight than those of history; and we often make use of them, not so much to corroborate what we say, as to throw a kind of ornament over it."

Mr. Hallam concurs with Sir James Mackintosh, when he says that it will be seen, on reference to this passage, that Grotius proposes to quote poets and orators cautiously, and rather as ornamental than authoritative supports of his argument. "In no one instance," writes Mr. Hallam, will he be found to "enforce a moral duty, as Paley imagines, by their sanction. It is nevertheless to be fairly acknowledged, that he has sometimes gone a good deal further than the rules of a pure taste allow, in accumulating quotations from poets, and that, in an age so impatient of prolixity as the last, this has stood much in the way of the general reader."

I shall touch very briefly on the criticism of Jeremy Bentham, who condemns the work as having no definite stamp or character, but being sometimes political or ethical, sometimes historical or juridical, sometimes expository or censorial. From such charges it is not possible, perhaps it is not desirable, to vindicate Grotius altogether. There is no doubt a profusion of learning in his work, which sometimes rather encumbers than adorns it. The method is also somewhat disorderly; and too many scattered digressions occur. But the same objections may be taken to Adam Smith's great work on the Wealth of Nations. The nature, however, of the subject, substantially demanded at the hands of the great master, that he should cite examples from the history of mankind to illustrate and support the application of the general principles of law and politics; on the

other hand the principles of natural law are so interwoven with those of ethical science, that an entire separation of them was not very feasible, perhaps not altogether desirable.

The criticisms of Paley and Bentham, however, contain very mild censure in comparison with the scornful attack upon Grotius which is to be found in the first dissertation on the Progress of Philosophy by Dugald Stewart. The fame of this writer renders it necessary to vindicate the memory of one still more illustrious in reputation, from the hasty animadversion which he has passed upon him, in ignorance of the contents of his great work. Mr. Hallam, on a careful examination of Stewart's criticisms, does not hesitate to say, that it is very manifest that Stewart had never read much of his work, or even gone over the titles of his chapters; and he displays a similar ignorance as to the other writers on natural law, who for more than a century afterwards, as he admits himself, exercised a great influence over the studies of Europe.

"I have never read those pages of an author," writes Mr. Hallam, "whom I had unfortunately not the opportunity of knowing personally, but whose researches have contributed so much to the delight and advantage of mankind, without pain or surprise. It would be too much to say that in several parts of the first dissertation, by no means in the first days of Stewart's writings, other proofs of precipitate judgment do not occur; but that he should have spoken of a work so distinguished by fame, and so effective, as he himself admits, over the public mind of Europe, in terms of unmingled depreciation, without having done more than glanced at some of its pages, is an extraordinary symptom of that tendency towards pre-

judice, hasty but inveterate, of which this eminent man seems to have been not a little susceptible."

Dugald Stewart had read little of Grotius; and what little he had read, truth compels me to say that he did not care to understand, for I should be unwilling to suppose that he would have designedly distorted or misrepresented his doctrines. Far different were the views of Adam Smith, who speaks of Grotius, as of one who was the first "to attempt to give to the world anything like a system of those principles which ought to run through and be the foundation of the laws of all nations; and his treatise on the laws of peace and war, with all its imperfections, is perhaps at this day the most complete book that has yet been given on the subject."

It is a satisfaction to be able to quote the deliberate judgment of so learned and so temperate a writer as Mr. Hallam in defence of a work, the defects of which have been magnified by writers too careless to make themselves acquainted with its merits, or strongly prejudiced, like Rousseau and other French writers, against the method of reasoning. The author, however, of the History of the Inductive Sciences, than whom perhaps no one is better versed in the Baconian method, has felt called upon not merely to defend Grotius, but to undertake an edition of his great work, which has lately appeared under the auspices of the syndics of the press of the university of Cambridge. "The work itself," Dr. Whewell considers "to be characterised by solid philosophical principles consistently applied, by clear and orderly distinction of parts, by definite and exact notions, improved by the intellectual discipline of legal studies, by a pure and humane morality, always inclining to the higher side in disputed questions, and

by a pervading though temperate spirit of religion." These are no ordinary encomia, nor do they come from the pen of an ordinary critic.

With regard to the method of Grotius, it is essentially inductive. The proof of many of his positions was to be found in the custom of mankind; and that custom was to be established by a large induction. "Truth," in his opinion, to apply to our subject the striking language of Milton, in his Discourse on unlicensed Printing "came once into the world with her divine Master, and was a perfect shape, most glorious to look upon; but when he ascended, and his apostles after him were laid asleep, then straight arose a wicked race of deceivers, who, as that story goes of the Egyptain Typhon, with his conspirators, how they dealt with the good Osiris, took the virgin Truth, hewed her lovely form into a thousand pieces, and scattered them to the four winds. From that time, ever since, the sad friends of truth, such as durst appear, imitating the careful search that was made for the mangled body of Osiris, went up and down gathering up limb by limb, still as they could find them."

The above passage, which embodies the wild and vigorous imagery of the Commonwealth, was applied by Milton to illustrate the labours of the disciples of Faust and Gutenberg; but it is likewise most appropriate to the labourers in the general field of inductive science. Those who gaze on the perfect form in which their work results, know little of the painful stages which have been undergone in fitting together the disjected limbs of truth, just as mariners, who guide their vessels through dangerous shoals by well-known beacons, think little of the labours of those who have first explored and buoyed the channel, and who have set up the landmarks.

Some of the later writers on international law have treated the doctrine of an universal law of nations, founded on the common agreement of mankind, as an empty fiction, to which nothing in fact really corresponds. But it never was intended by Grotius, to set up a rule like that which theologians have termed the golden rule of Vincentius Lirinensis, "Quod semper, et ubique, et ab omnibus." The words of Grotius are, "there are two ways of investigating the Law of Nations. We ascertain this law either by arguing from the nature and circumstances of mankind, or by observing what is generally approved by all nations, at least by all civilised nations. The former is the more certain of the two; but the latter will lead us, if not with the same certainty, yet with a high degree of probability to the knowledge of this law. For such an universal approbation must arise from some universal principle; and this principle can be nothing else than the common sense or reason of mankind. (L. 1. c. 1. § 3.)

Grotius might have gone a step further, and might have said that this common consent of mankind was the voice of God declaring his will through the common conscience of the human race. It is thus indeed that many things which upon *à priori* reasoning might be justified by the Law of Nature as strictly deducible from admitted first principles, are condemned before the tribunal of the human conscience; and when the agreement of all the more civilised nations in such matters is ascertained, we are not at liberty to disregard it consistently with moral duty, nor may we safely fall back within the domain of abstract principle.

LECTURE II.

Selden, Mare Clausum. — Hobbes, De Cive. — Dr. Richard Zouch, Jus inter Gentes. — Natural and Positive Law. — Second Period: Era of Pufendorf. — Bishop Cumberland, De Legibus Naturæ. — Pufendorf's Denial of a Law of Nations distinct from the Law of Nature. — Practice of Nations not obligatory as a Rule. — Mischievous Effect of his Teaching. — Professor Rachel. — Christian Thomasius supports Pufendorf's Doctrine. — Glafey and Köhler, Opponents of it. — Van Bynkershoek, De Foro Legatorum. — Jus Gentium Pactitium. — Leibnitz, Codex Juris Gentium Diplomaticus. — Dumont, Corps Universel Diplomatique du Droit des Gens. — Third Period: Christian von Wolff revives the teaching of Grotius. — His Work, Jus Gentium Methodo Scientifica Tractatum, recast by M. de Vattel. — Von Wolff's peculiar Doctrine. — Nations composite Bodies, and so subject to a Law different from the Law of Nature applicable to Individuals. — Vattel's Doctrine on this Head. — Necessary and Voluntary Law of Nations. — Fourth Period: J. J. Moser. — Practical Law of Nations. — Von Martens — Schmalz. — Klüber. — — Wheaton. — Judicial Decisions. — Chancellor Kent. — Lord Stowell. — Practice of Nations limits abstract Principles. — Heffter. — External and internal Public Law. — Private International Law. — Mr. Justice Story, Conflict of Laws. — Huberus, de Conflictu Legum. — Fœlix, Traité du Droit International Privé. — Austin on Jurisprudence. — International Morality. — Obligation and Sanction of the Law of Nations.

It was observed in the course of the previous lecture, that the writings of Grotius made their way much more slowly, and were received under greater limitations in England than on the continent of Europe, and that this result was partly attributable to the antagonism of Selden. The doctrine of

Grotius, as to the right of occupancy in regard to the sea not precluding others from its innocent use, had brought him into fierce controversy with Selden; Grotius, in his Mare Liberum, maintaining the right of the Dutch fishermen to the use of the seas which England claimed to be her own by occupancy, whilst Selden, in his Mare Clausum, contended that England had a right to exclude them altogether from its use.

If we were to measure the merits of Selden as a teacher of the Law of Nations, by his work De Jure Naturali et Gentium secundum disciplinam Ebræorum, published in 1640, he would not be found to weigh very heavy in the scale against his great opponent, as he there divides the Jus Gentium into (1st) the natural or primary law of all mankind, corresponding to the Jus Gentium of the Roman law; and (2nd) the law which is peculiar to certain nations, which seems to be akin to the Jus Civile of Gaius and Justinian. But he had shown in the Mare Clausum, published in 1635, a clear appreciation of something more definite, as in that work he distinguishes a Jus Gentium of a secondary kind, "quod interveniente sive pacto, sive morum usu, natum est." In this respect Selden was considerably in advance of Hobbes, who, in his treatise De Cive, published in 1642, limits the Jus Gentium to the Law of Nature as applied to whole states or nations, and does not attend to any other head or source of international law. But there is a third English writer on international law, the contemporary of Selden and Hobbes, who claims precedence of them both as a master of the science, and whose work, Juris et Judicii fetialis, sive Juris inter gentes, Explicatio, entitles him to take rank next to Gro-

tius. Dr. Richard Zouch, Professor of Civil Law in the University of Oxford in 1629—1661, and subsequently Judge of the High Court of Admiralty, published in 1650 a work upon Fetial Law, or, as he termed it, "Jus inter Gentes." In choosing this expression in preference to the more familiar phrase "Jus Gentium," Dr. Zouch anticipated the objection taken at a subsequent period by the Chancellor D'Aguesseau, who suggested, and who in this matter has been followed by Mr. Bentham, that the law which governs the reciprocal intercourse of nations should be called "Droit entre les Gens," as a more correct phrase than Droit des Gens. Dr. Zouch, having undertaken to treat of the rights which are involved in the relations of princes or states with one another, proceeds to divide the law which regulates those relations, into *natural*, or that which is founded on the tacit consent of nations, and *positive*, or that which is based on the express agreement of nations, as declared in their treaties and alliances. His language is free from ambiguity. "Cum multi diversis temporibus idem affirmant, id ad causam universalem referri debet, quæ alia esse non potest, quam recta conclusio ex naturæ principiis proveniens, aut communis aliquis consensus, e quibus illa jus naturæ indicat, hic jus gentium." His doctrine is so far perfectly in accordance with that of Grotius. Dr. Zouch, however, having undertaken to discuss the Jus Fetiale, or the Jus inter Gentes, could not overlook the *Positive Law* between nations. "Deinde præter mores communes, pro jure etiam inter gentes habendum est, in quod gentes singulæ cum singulis inter se consentiunt, utpote per pacta, conventiones, et fœdera." In other words, the Jus inter Gentes is a more comprehensive body of rules than the Jus

Gentium. International law, as treated by him, comprised both the common unwritten Law of Nations founded on general custom, and the special written law founded on distinct treaties and conventions. Dr. Zouch has had scanty justice done to him; for he leaves little to be desired in his writings in a philosophical point of view, and it will be found on examining the details of his comparatively short treatise, that hardly anything has been omitted by him, which comes within the proper province of the subject.

The first period, that of Grotius, which opened in 1625, may be considered to close in 1673, with the appearance of Pufendorf in the chair of the Law of Nations at Heidelberg, when ethical philosophy once more resumed her encroachments on the province of jurisprudence. Pufendorf, by birth a Saxon, and, by adoption a Swede, was invited to fill the professor's chair which the Elector Palatine had established in 1661, being the first of its kind, in the university of Heidelberg, with the express object of expounding the doctrines of Grotius. Pufendorf had, in the preceding year, by the publication of a work on the Elements of Universal Jurisprudence, shown himself to be a person of great erudition; but he did not bring to the task, of elucidating the new doctrine, either the enlarged views of its author, or a capacity adequate to grasp the subject which he was called upon to treat. Accordingly, he contributed very little to advance the science; or perhaps it ought to be confessed that he obstructed rather than promoted its progress. Pufendorf had, no doubt, a very noble object in view; viz. to establish the system of moral right on a basis independent of Revelation. In this respect his claims have been placed by very competent judges in the

same scale with those of Richard Cumberland, Bishop of Peterborough, whose famous work, De Legibus Naturæ Disquisitio Philosophica, published in 1672, is held to have constituted an era in the history of ethical philosophy. The chief characteristic of Cumberland's work, in opposition to the school of Hobbes, was that his system stood on a basis complete in itself without the aid of Revelation, that it did not appeal to the authority of schoolmen and canonists, but to observation and experience; and that, whilst it reduced, at least in theory, the morality of actions to definite calculations, it left the application of principles to cases, as they arose, at the discretion of the reader. In like manner, Pufendorf asserted a demonstrative certainty in moral science, referring the rule of morality to God's appointment, but admitting that God could not have given to man any other law than that under which he exists, consistently with the constitution of human nature. The style of Pufendorf is diffuse and technical. He adopts the distinction of perfect and imperfect rights, but objects to the division of expletive and attributive justice observed by Grotius. The boundaries, also, which Grotius had so carefully drawn between the Law of Nations and the Law of Nature, Pufendorf swept away, maintaining that the customs and usages which nations generally observe in war have no proper legal obligation in them, and that, unless they are deduced from the Law of Nature, they are perfectly arbitrary and may be rejected at pleasure.

Pufendorf, in his earlier work on the Elements of Universal Jurisprudence, had denied the existence of a Jus Gentium, even in the sense in which that head of law had been admitted by Roman jurisconsults, and referred all questions either to the common Law

of Nature, or to the civil law of states. "Something," he says, "is now also to be added concerning the Jus Gentium, which, according to some, is nothing else than the Law of Nature, so far as different nations, not united under one supreme command, observe it in relation to each other, to whom reciprocally the same duties are to be performed in their own manner as are prescribed to individuals by the Law of Nature; concerning which Law of Nations there is no occasion we should here peculiarly treat, seeing the doctrine we expound respecting the Law of Nature, and the duties of individuals, may be easily applied to states, and entire nations, which have coalesced into one moral person. Besides, we think there exists *no Jus Gentium* which can be properly designated by such name; for most of those things which are referred by the Roman jurisconsults and others to the Law of Nations, such as certain things concerning the modes of acquiring property, contracts, and other matters, belong either to the Law of Nature or to the civil law of single nations, which, in those matters, coincides with the civil positive laws of most states. From these, however, a peculiar species of law is not correctly constituted, because, although those laws are common to nations among themselves, they do not arise from any convention or mutual obligation, but from the particular will of individual legislators in single states, and therefore may be changed by one people without consulting the others, and are often found changed.

"Finally, there are included under the name of *Jus Gentium* those customs among most nations, at least among such as claim the reputation of superior cultivation and humanity, which, by a certain tacit consent, are more especially observed with regard to

war. For after it came to be held to be the greatest honour among those more civilised nations to acquire glory in war — that is, to show one's preeminence in it, by having the courage and skill and dexterity to destroy great numbers of men ; and after that nations were thus induced to rush into unnecessary and unjust wars, most nations thought it right, that they might not too much expose their ambition to envy, by using all the licence of a just war, to temper and moderate the atrocity of wars generally, by some degree of humanity and a certain show of magnanimity: hence usages concerning the exemption of certain things and persons from hostile violence, a certain moderation in destroying the enemy, a milder mode of treating prisoners, and the like. But although one, in carrying on lawful war, should neglect these things, — namely, when this can be rightly done by the Law of Nature, — one cannot be said to have thereby contravened any valid obligation further than being generally accused of rudeness, because one had not conformed to the custom of those who reckon war among the liberal arts; just as, among gladiators, one is accused of want of skill who wounds another not according to the formal rule of the art. Therefore, if any one carries on just wars, he may regulate them by the Law of Nature alone, and is not bound by any law to observe these customs, unless he chooses to do so of his own accord and with a view to some advantage. By him, however, who engages in unjust wars, these usages are on this account to be observed, that he may inflict injuries with some moderation." (*Elementa Jurisprudentiæ Universalis*, §§ 24. and 25.)

Mr. Hallam has entered into a full analysis of the larger treatise of Pufendorf on the Law of Nature and Nations, and observes that the great difference be-

tween the treatises of Pufendorf and Grotius is, that whilst Grotius contemplated the law that ought to be observed amongst independent communities as his primary object, to render which more evident he lays down the fundamental principles of private right or the Law of Nature, Pufendorf not only begins with Natural Law, but makes it the great theme of his inquiry." Pufendorf had probably intended, if we may judge from the title of his work, to range at large over the field of Public Law; but from the length to which his inquiries had been extended on the subject of Natural Law, he had left little room for International questions, and accordingly, although he may have attained a higher position than Grotius as an authority in moral philosophy, he is not by any means on a level with him as a jurisconsult, and the result of the great reputation which he acquired as a moral philosopher, was disastrous to the progress of the science of International Law. Von Ompteda, in his "Literature of the Law of Nations," on reviewing the effects of Pufendorf's teaching, goes so far as to say, that the consequence was that this science, which was just putting forth blossoms through the exertions of Grotius and others, was nipped in the bud, withered, and decayed, and did not fully revive until towards the middle of the following century. (*Literatur des Gesammten sowohl Natürlichen als Positiven Völkerrecht. Regensburg:* 1785.)

The treatise "De Jure Naturæ et Gentium," in eight books, was published in 1672, at Lund, in Sweden, where Pufendorf filled the chair of moral philosophy. The fame of its author obtained for it a very general reception, and his opinions were adopted by the majority of learned men. Individuals, however, were

not wanting, who entertained doubts as to the soundness of his system in abolishing the distinction which Grotius had instituted between natural law and positive or customary law. They were few perhaps and came far between, but they handed on the torch to one another, and kept the flame alive. One of the most distinguished amongst the opponents of Pufendorf was Samuel Rachel, successively professor in the universities of Helmstadt and Kiel, and a diplomatist of note, who took part as the envoy of Holstein-Gottorp at the Congress of Nîmeguen. In his two dissertations, "De Jure Naturæ et Gentium," published in 1676, he maintained the division of law adopted by Grotius, and added somewhat greater precision to the science, by formally distinguishing, as Dr. Zouch had previously done, the conventional from the customary law, assigning to the former division the name of *Jus Pactitium*, and so constituting that threefold division which is adopted in the present day by most jurists, to wit, the Natural Law, the Customary Law, and the Conventional Law. The efforts, however, of Rachel and his followers to revive the more scientific view of the subject were foiled by the weight of learning which Christian Thomasius threw into the opposite scale. This distinguished jurisconsult and philosopher of the university of Halle, who otherwise deserves mention as the first to make use of the vernacular language in the professor's chair, by his work entitled, "Fundamenta Juris Naturæ et Gentium ex Sensu Communi deducta," published in 1705, secured for his views, which coincided with those of Pufendorf, a supremacy which was not successfully disturbed until the middle of the eighteenth century, when Christian von Wolff redressed the scale in favour of the Grotian doctrine. Not that learned

writers did not from time to time step forth and break a lance with the followers of Pufendorf and Thomasius, such as Adam Friderich Glafey, of Leipsic, and subsequently Councillor of State at Dresden, who had very definite and correct ideas respecting the voluntary Law of Nations, and maintained its existence as distinguished from the natural law, by numerous examples from recent times, in his treatise entitled "Vernunft-und-Völkerrecht," 1723; and Henry Köhler, professor of philosophy at Jena, who in his work entitled "Juris Socialis et Gentium ad Jus Naturæ revocati Specimina Septem," published in 1739, discussed the principles of the Law of Nations with great lucidity and precision. These authors, however, were little known beyond the limits of Germany, but one writer of this period requires a fuller notice, as he established for himself an European reputation, which has been maintained in all its freshness to the present day. I allude to Van Bynkershoek.

Van Bynkershoek has immortalised himself by his treatise "De Foro Legatorum," in which he vindicates the rights of Embassy from the narrow view which Pufendorf had taken of them, and by his "Questiones Juris Publici in Rebus Bellicis." (Lugd. Batav. 1737.) Everything which came from this great man bears the stamp of original thought and indicates a vigorous and independent mind. He often expresses himself with boldness and vehemence, and sometimes with an apparent contempt for the opinions of others; but his learning, sagacity, and sound judgment rarely if ever desert him, and his authority is as great in the courts of Maritime and International Law as in the Schools of Jurisprudence.

Dr. Zouch was the first to assign a formal place to the Jus Gentium Pactitium, or, as it is now generally

termed, the Conventional Law of Nations; and he was followed in that classification by Professor Rachel. Pufendorf (L. XI. c. 111.) had touched this subject very slightly, considering it to be "undistinguishable and not properly the subject of science, as it varied with the contracting parties and was subject to many vicissitudes, and belonged more to the province of history than of law." Materials, however, were fast accumulating to form a suitable subject for scientific treatment. In the early part of the 18th century there appeared from the press in different parts of Europe various collections of treaties and conventions. Leibnitz had given an impulse to the study of treaties by his "Codex Juris Gentium Diplomaticus," published in 1695, which he re-edited in a more enlarged form in 1700, accompanied with a second part, under the title of "Mantissa Codicis Juris Gentium Diplomatici." About the same time there appeared at Amsterdam a collection of treaties, in 4 vols. folio, published by an association of booksellers at Amsterdam and the Hague, and edited by Jacob Bernand, some time afterwards professor of philosophy in the university of Leyden. This was, however, only the prelude to a far larger collection, the great work of Dumont, "Corps Universel Diplomatique du Droit des Gens," in 8 vols. folio, which was also published at Amsterdam, and occupied six years in its completion. Schmauss had also published in 1730 a small collection in two volumes 8vo., "Corpus Juris Gentium Academicium," almost entirely confined to the treaties of the two preceding centuries; so that the materials for the study of *positive* International Law as distinguished from *natural* were most ample in 1749, when Christian von Wolff vindicated once more the superiority of the School of Grotius, and moulded the system of

International Law into the more complete form in which it now exists.

Leibnitz, whom Gibbon has compared to those conquerors whose empires have been lost in the ambition of universal conquest, and of whom Mr. Hallam observes, that he was the only man in the world who could have left so noble a science as philosophical jurisprudence for pursuits of a still more exalted nature, and for which he was still more fitted, comprised both the philosophy of law and the details of practical jurisprudence within the vast circle of his attainments. He had given to the Law of Nations but a slight and passing attention, but he had raised the estimation in which the study was held; and since his time it is admitted that "philology, history, and philosophy have, at least in Germany, marched together under the robe of law." The impulse which he communicated to the study of positive International Law was both powerful and permanent. The writer, however, upon whom the mantle of Grotius properly descended, was von Wolff, who may be said to have rivalled Leibnitz in capacity of intellect, though he fell short of him in variety of attainments.

Von Wolff had reached his seventieth year when he composed a work, the title of which fully made known its subject, "Jus Gentium Methodo Scientificâ pertractatum, in quo Jus Gentium Naturale ab eo, quod Voluntarii, Pactitii, et Consuetudinarii est, accurate distinguitur." This work, which consists of a single volume, although it is a complete and independent treatise, may be regarded as the complement of his voluminous work on the Law of Nature, which had preceded it, in 8 vols. The confusion of the larger work with the treatise on the Law of Nations has induced many persons to neglect the perusal of

the latter, deterred by its supposed bulk, and misled by the circumstance that M. de Vattel recast the work in a lighter and more agreeable form, and edited his book in the French language, under the well-known title, "Droit des Gens, ou Principes de la Loi Naturelle appliqués à la Conduite et aux Affaires des Nations et des Souverains," thus superseding the necessity of consulting the original treatise in its Latin dress. There is hardly any instance in which posterity has been more unjust than in ascribing to the popular abridgment of Vattel the authority which is due to the original work of von Wolff, the appearance of which may be said to form *the third period* in the history of the science.

Von Wolff adopted in his system the distinction between the Jus Gentium Naturale and the Jus Gentium Voluntarium, by the side of the Jus Pactitium and the Jus Consuetudinarium. This was a step towards greater precision, by introducing a theory of International society, according to which the family of nations, constituted as the "Civitas Maxima," has a right to impose upon its members certain laws in their common interest, and to compel them to observe them. It has been objected to von Wolff, that in resting the obligation of his Jus Gentium Voluntarium on an imaginary family of nations, he has been misled by his excessive desire to demonstrate everything, inasmuch as history does not supply evidence of any such universal association: nay, it may be argued that the theory is irreconcileable with the rights of independence, one of the attributes of sovereign states. But I am rather disposed to think that the error of von Wolff was more an error of form than of substance. He perceived that nations in relation to one another, although legally independent as communities, were morally dependent

in respect of the gratification of their mutual wants by commercial intercourse, and that such intercourse could only be carried on under conditions of reciprocity, which led to the formation of what may be termed "an inner circle" of the more civilised nations, regulating their mutual intercourse by rules not applicable to the outer circle of nations in a less cultivated state. The members of this inner circle of International life constituted the "Civitas Maxima" of von Wolff, shadowed out somewhat indistinctly by him, and perhaps constructed on too fictitious a basis to stand the test of strict analysis, but still having a basis of reality.

The judgments of Lord Stowell supply us with a practical illustration of the distinction between these inner and outer circles — the former amenable to the Jus Gentium Voluntarium, the latter only to the Jus Gentium Naturale, and against which, as in the instance of the Barbary States, he declined to enforce the Voluntary Law of Christendom. Although therefore the basis upon which von Wolff raised his superstructure of "Voluntary Law" may perhaps not be perfectly sound and practical, still the fundamental idea involved in the distinction was a step in the right direction. "He was not," writes Von Ompteda, "far from the object at which he aimed, but he might have arrived at it by a shorter road." Nations are not legally bound to unite themselves into a society, nor are they justly compellable to maintain reciprocal intercourse, otherwise their independence of one another would be at an end. But they may associate themselves, and hold mutual intercourse, by submitting to certain rules under which reciprocity is attainable; and according to the degree of advancement in civilisation attained by different nations, these

rules may be extensions or modifications of those International rules which are found applicable to a less cultivated state of mankind. The intercourse of European nations in the present day with China, as contrasted with their intercourse with one another, may be cited as illustrating the application of the Jus Gentium Naturale in distinction from the Jus Gentium Voluntarium. The non-intercourse with Japan, on the other hand, may be regarded as a recognition of the principle upon which the distinction proceeds,—namely, that independent nations are not compellable to enter into society with one another or to hold intercourse of any kind.

The great feature of von Wolff's system, if I may so say, which makes the appearance of his work an epoch in the history of the science only second to that of Grotius, was that he saw that the Law of Nature could not be applied to communities of men or states simply as *aggregate bodies* of individual men. Hobbes and Pufendorf both agreed in maintaining that the Law of Nature, as applied to the relations of individual men as moral agents, underwent no necessary modification in its application to states or nations, and contended that the maxims of the Law of Nations and the Law of Nature were precisely the same. Barbeyrac, the translator and commentator of Grotius and of Pufendorf, in a note to the treatise of Grotius, admitting the principles and rules of the Law of Nations to be the same as those of the Law of Nature, observes that there is a difference with respect to the two laws as to the mode in which those principles are applied. Von Wolff developed this doctrine more fully. Having admitted that nations were in one sense *aggregate* bodies of individuals, upon whom certain duties were obligatory, and to whom certain

rights attached by reason of the personality of the individuals, he maintained that, as nations are *composite* bodies, and have in their *collective* capacity a moral being of their own, and are in such character the subject of the obligations and rights which result by the Law of Nature from the act of association which has constituted them political bodies, it follows that the nature and essence of their moral being necessarily differ in many respects from the nature and essence of the physical individuals or men of whom they are composed. When therefore we would apply to nations the duties which the Law of Nature prescribes to individual men, and the rights which it confers on the latter in order to enable them to fulfil their duties, since such rights and such duties cannot be otherwise than consistent with the nature of their subject, they must in their application necessarily undergo a change suitable to the new subjects to which they are applied. Thus it results that the Law of Nations cannot be in every particular the same as the Law of Nature regulating the actions of individual men.

The elegant and popular French writer, whose work is in the main an abridgment of the treatise of von Wolff, has followed closely in his track in regard to this important distinction between the Law of Nature and the Law of Nations. In his preliminary chapter on the idea and general principles of the Law of Nations, Vattel writes thus: "We must therefore apply to nations the rules of the Law of Nature, in order to discover what their obligations are and what their rights; consequently the Law of Nations is no other than the Law of Nature applied to individuals. But as the application of a rule cannot be just and reasonable unless it be made in a manner suit-

able to the subject, we are not to imagine that the *Law of Nations* is precisely and in every case the same as the *Law of Nature*, with the difference only of the subjects to which it is applied, so as to allow of our substituting nations for individuals. A state or civil society is a subject very different from an individual of the human race; from which circumstance, pursuant to the Law of Nature itself, there result in many cases very different obligations and rights, since the same general rule, applied to two subjects, cannot produce exactly the same decisions when the subjects are different, and a particular rule, which is perfectly just with respect to one subject, is not applicable to another subject of a quite different nature. There are many cases therefore in which the *Law of Nature* does not decide between state and state in the same manner as it would between man and man. We must therefore know how to accommodate the application of it to different subjects; and it is the art of thus applying it, with a precision founded on right reason, that renders the *Law of Nations* a distinct science."

Vattel has not hesitated in his preface to acknowledge his obligations to von Wolff. "Although my work," he says, "be very different from his (as will appear to those who are willing to take the trouble of making the comparison), I confess that I should never have had the courage to launch into so extensive a field, if the celebrated philosopher of Halle had not preceded my steps, and held forth a torch to guide me on my way. Sometimes, however, I have ventured to deviate from the path which he had pointed out, and have adopted sentiments opposite to his." Thus Vattel has rejected the idea of patrimonial kingdoms as improper and as dangerous, both in the

results to which it leads and in the impressions which it may give to princes. He has also rejected the theory of a "Civitas Maxima," a great republic instituted by nature herself, and of which all the nations of the world are members. "Baron Wolff," he observes, "admits that a rigid adherence to the Law of Nature cannot always prevail in the commerce and society of nations; it must undergo various modifications, which can only be deduced from this idea of a kind of great republic of nations, whose laws, dictated by sound reason and founded on necessity, shall regulate the alterations to be made in the natural and necessary Law of Nations, as the civil laws of a particular state determine what modifications shall take place in the natural law of individuals. I do not perceive the necessity of this consequence; and I flatter myself that I shall, in the course of this work, be able to prove that all the modifications, all the restrictions, in a word, all the alterations which the rigour of the natural law must be made to undergo in the affairs of nations, and from which the voluntary Law of Nations is formed — to prove, I say, that all these alterations are deducible from the natural liberty of nations, from the attention due to their common safety, from the nature of their mutual correspondence, their reciprocal duties, and the distinctions of their various rights, internal and external, perfect and imperfect, by a mode of reasoning nearly similar to that which von Wolff has pursued, with respect to individuals, in his treatise on the Law of Nature.

"Since nations, in their transactions with each other, are equally bound to admit those exceptions to, and those modifications of, the rigour of the necessary law, whether they be deduced from the idea of a great republic, of which all nations are supposed to be the

members, or derived from the sources whence I propose to draw them, there can be no reason why the system which thence results should not be called the *Voluntary Law* of Nations, in contradistinction to the *Necessary*, Internal, and Consciential Law. Names are of very little consequence; but it is of considerable importance carefully to distinguish these two kinds of law, in order that we may never confound what is just and good in itself with what is only tolerated through necessity.

"The *necessary* and the *voluntary* Law of Nations are therefore both established by nature, but each in a different manner — the former as a sacred law which nations and sovereigns are bound to respect and follow in all their actions; the latter as a rule which the general welfare and safety oblige them to admit in their transactions with each other. The necessary law immediately proceeds from nature; and that common mother of mankind recommends the observance of the voluntary Law of Nations, in consideration of the state in which nations stand in respect to each other, and for the advantage of their affairs. This double law, founded on certain and invariable principles, is susceptible of demonstration, and will constitute the principle subject of this work.

"There is another kind of Law of Nations, which authors call *arbitrary*, because it proceeds from the will or consent of nations. States as well as individuals may acquire rights and contract obligations, by express engagements, by compacts and treaties; hence results a *conventional law* of nations peculiar to the contracting powers. Nations may also bind themselves by their *tacit* consent: upon this ground rest all those regulations which custom has introduced between different states, and which constitute

the *usages* of nations or the Law of Nations founded on custom. It is evident that this law cannot impose any obligation except on those particular nations who have, by long use, given their sanction to its maxims; it is a peculiar law, and limited in its operation as the *conventional law:* both the one and the other derive all their obligatory force from that maxim of the natural law which makes it the duty of nations to fulfil their engagements whether express or tacit. The same maxim ought to regulate the conduct of states with regard to the treaties they conclude, and the customs they adopt. I must content myself with simply laying down the general rules and principles which the Law of Nature furnishes for the direction of sovereigns in this respect. A particular detail of the various treaties and customs of different states belongs to history, and not to a systematic treatise on the Law of Nations."

Von Wolff and Vattel may be said to have exhausted the subject of natural International Law, not by *à priori* assumptions and deductions, but by patiently observing the actual relations of nations, and by carefully analysing those relations and inferring from them general rules and principles. What chiefly remained to be done was to combine those principles with the results of established usage and of treaty-engagements.

I have alluded to Leibnitz as being the first who collected a body of conventions concluded between independent states, in order to promote the cultivation of the science of International Law. In such a sense, it has been already observed that International Law is an expression of wider import than the Law of Nations. The Law of Nations is a common rule of international life, uniform and invariable; treaties, on

the other hand, and conventions are special contracts, involving sometimes a departure from the common rule, but more frequently made to meet cases not provided for by any common rule. They constitute at the present time a very large division of the public law of Europe, which may be said to have grown up almost entirely since the Thirty Years' War, so that in the time of Grotius it was not of sufficient importance to arrest his attention or to require a separate classification. Within a century, however, after the Thirty Years' War, the relations of peace and war had alternated so repeatedly in Europe, and contracts of alliance and treaties of peace had come to be recorded so frequently in history, that there was a mass of positive law, exceptional to the general law, which it became necessary to arrange in a scientific form, in order to master the study of the entire system of European public law.

A celebrated German jurist, John Jacob Moser, in the middle of the last century, undertook the task of collecting these records, and arranging their contents in a scientific form. He conceived the design of a great work, which should embrace the whole circle of European State-affairs from the death of the Emperor Charles VI. in 1740 ; and with this object solicited the support of European Courts. But the cabinets of princes were closed against his proposals, so that he ultimately abandoned his main design, and was content to give to the world the materials which had come under his observation whilst he was composing a series of essays on the latest European Law of Nations, based on the state proceedings of the European powers subsequently to the year 1740.

Moser's method of investigation in his earlier work on the foundation of European International Law

(Grundsätze des jetz üblichen Europäische Völkerrecht in Friedenzeiten und in Kriegszeiten, Hanau, 1750), is somewhat dry and meagre, and he does not allow himself to illustrate the lessons of experience in connection with any general principle; in his later "Contributions" (1778) and "Essay" (1780) the dictates of experience are repeated and illustrated by copious precedents from the most recent times; and he may be said to have constructed a science, hitherto unknown, of the *positive* Law of Nations, the complement of the edifice which von Wolff had built up. Henceforth we embark upon a new period in the history of the science. The *third period*, extending from 1740 to 1785, which has just been discussed, has been distinguished by the separate cultivation of the twofold branches of natural and positive law; the *fourth*, at which we have now arrived, is characterised by the combined cultivation of the two branches as a whole.

We may pass by speculative writers, such as Kant and Fichte, who have occupied themselves with inquiries and discussions about perpetual peace, the republic of nations, the federal system, and Utopias of a like nature, and who have desired to trace the rules of natural international law to abstract principles of a still more general nature than Wolff had ventured to propose. Their investigations belong rather to the province of philosophy than of jurisprudence. Such writers have contributed less to the improvement and elucidation of the science which they professed to discuss, than the contemporary practical school, which followed in the track of Moser, and at the head of which Von Martens must be placed. Von Martens left far behind him the works of Moser and his immediate followers. With greater discrimination, and with more

complete results than his predecessors, he distinguished not merely the Law of Nature, but the *general* Law of Nations, from the *practical* Law of Nations received in Europe, unfolding the peculiar doctrines of the last, and showing how the European system of public law rested not merely on general abstract principles, but also upon the usages and the conventions of the European states. "The different works of this author," says Von Kamptz in his continuation of Von Ompteda's work on the Literature of the Law of Nations (Neue Literatur des Völkerechts seit dem Jahre 1784. Berlin 1817), "are remarkable for their mutual interdependence and perfect consistency, and for the support which they afford to one another. The one series contains the records of the views of the European nations upon the principles of law acknowledged amongst them, whilst the other constructs out of these records a system of practical international law."

The writings of Von Martens, followed by those of the Prussian privy councillor Schmalz (Das Europäische Völkerrecht, published in 1817, and translated into French by M. de Bohm), by the treatise of Klüber (Droit des Gens moderne de l'Europe, 1819), Professor and Councillor of State, who took an active part in reducing and recording the proceedings of the Congress of Vienna, and last of all by Mr. Wheaton's Elements of International Law (Elements of International Law, 3rd edition, 1846. Philadelphia), have enlarged and improved our knowledge of the general system, as well as of the particular doctrines of the European Law of Nations. But, by the side of these last writers, another class of authorities, in matters neglected and not foreseen by the text writers, are to be studied in the judgments of those who have had to admi-

nister and judicially expound the principles and practice of international law.

"Many of the most important principles of public law have been brought into use, and received a practical application, and been reduced to legal precision, since the age of Grotius and Pufendorf; and we must resort to the judicial decisions of the prize tribunals of Europe and in this country [the United States of North America] for information and authority on a great many points, on which all the leading text-writers have preserved a total silence. The complexity of modern commerce has swelled, beyond all bounds, the number and intricacy of questions upon national law, and particularly upon the very comprehensive head of Maritime Capture. The illegality and penal consequences of trade with the enemy, the illegality of carrying the enemy's dispatches, or of engaging in the coasting, fishing, or other privileged trade of the enemy; the illegality of transfer of property *in transitu* between the neutral and belligerent, the rules which impress upon neutral property a hostile character, arising either from the domicile of the neutral owner, or his territorial possessions, or his connexion with a house of trade in the enemy's country, are all of them doctrines in the modern international law, which are either not to be found at all, or certainly not with any fulness of discussion and power of argument, anywhere but in the judicial investigations of the prize tribunals, and which have given the highest authority and splendour to this branch of learning."

Such are the observations of Chancellor Kent, in the first book of his Commentaries on American Law, in which there is a compendious chapter on the Law of Nations well worthy of perusal.

"A great part of the Law of Nations," says Lord Stowell (Flad-Oyen, 1 Robinson, 146.), "stands upon the usage and practice of nations. It is introduced on general principles; but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further and say that mere general speculation would bear you out in a further progress. For instance, on mere general principles it is lawful to destroy your enemy, and mere general principles make no great difference as to the manner in which it is to be effected. But the Conventional Law of mankind, which is evidenced in their practice, does make a distinction, and allows some and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of nations has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes."

The case to which Lord Stowell's observations applied, was the case of the Flad-Oyen, an English ship, which had been taken by a French privateer, and carried into the neutral port of Bergen in Norway, and there sold after a sort of sentence of condemnation before the French consul. It was the first attempt made to impose upon a Court of Admiralty the sentence not of a tribunal established in the belligerent country, but of a person pretending to be authorized within the dominions of a neutral power.

"It is my duty," said that eminent civilian, "not to admit, because one nation has thought proper to depart from the common usage of the world, and to meet the notice of mankind in a new and unprecedented manner, that I am on that account under the

necessity to acknowledge the efficacy of such a novel institution, merely because general theory might give it a degree of countenance, independent of all practice from the earliest history of mankind. The institution must conform to the text-law, and likewise to the constant usage of the matter; and when I am told that, before the present war, no sentence of this kind has ever been produced in the annals of mankind, and that it is produced by one nation only in this war, I require nothing more to satisfy me, that it is the duty of this Court to reject such a sentence, as inadmissible."

In another case (the "Henrick and Maria," 4 Rob. p. 52.) the same eminent judge delivered a similar opinion in these words. "It is said that, on principle, the security and consummation of the capture is as complete in a neutral port as in the port of a belligerent himself. On the mere principle of security it may perhaps be so. But it must be remembered that this is a matter not to be governed by abstract principles alone. The use and practice of nations has intervened and shifted the matter from its foundations of that species. The expression which Grotius uses on these occasions "*placuit gentibus*," is in my opinion perfectly correct, intimating that there is a use and practice of nations, to which we are now expected to conform." *

* A brief account of the series of great men, who have cultivated and adorned this branch of jurisprudence in England, and whose labours have contributed to define more precisely the rules of public law and have imparted a solidity and completeness to the system as administered before the English tribunals, will be found in the Preface to Dr. Robert Phillimore's Commentaries upon International Law, in the course of publication, and which are intended to embrace private as well as public law.

We may take an instance from the writings of three great authorities, Grotius, von Wolff, and Vattel, in illustration of the different results to which abstract principles lead us, as contrasted with principles reduced to practice. Von Wolff on abstract principles maintained that it was lawful to make use of poisoned weapons in war. On like grounds it has been contended, on the occasion of a debate in the House of Commons with reference to hostilities between Great Britain and China, that in the case of defensive warfare it was lawful for the nation invaded (e. g. the Chinese) to poison the springs. Grotius, however, held that it was contrary to the Law of Nations, not to the law of all nations, but at least to the law of European nations, and such as share in European culture, to make use of poisoned weapons, and that to poison the springs is not merely against the practice of olden times, but against the Law of God, "non tantum contra morem majorum, sed et contra fas Deûm." Vattel in like manner refuses to follow in the steps of von Wolff, and declares his adherence to the sounder doctrine of Grotius, observing that, when the Roman consuls rejected with horror the offer of the physician of Pyrrhus to poison his master, they declared it to be for the common interest of mankind not to set the example of such an atrocity.

Allusion has already been made to the expression "International Law," as of more extensive import than "the Law of Nations," which may be regarded as a specific subdivision of the former, in contradistinction to Treaty-Law, just as the municipal law of Great Britain comprises both the Common Law and the Statute Law. Writers, amongst whom Heffter, one of the most recent and most distinguished jurists of Germany, may be mentioned, have proposed to

designate the system of law, which regulates the mutual relations of sovereign states, by the name of *external Public Law* as distinguished from the *internal Public Law* of states, and thereupon assign to the expression International Law a still wider application, including under it those private relations between the citizens of separate states, which are recognised by civilised nations and are considered to be under their common protection; and to which, apart from that which regulates the relations between sovereign states, as such, the name of *private International Law* has been assigned. Thus the conflict of laws, foreign and domestic, as it has been termed by Mr. Justice Story, would fall within the province of private international law, which comprises the rules relating to the application of the civil and criminal laws of one state within the territory of another state, the rules in fact by which the conflict between the municipal law of different nations is to be appeased. Questions under this head are increasing in number every day with the increasing intercourse between nations. Foreign marriages, foreign divorces, wills made according to foreign forms, successions to real or personal property in foreign countries in cases of intestacy, contracts made at home and to be executed abroad, contracts made abroad and to be executed at home; these and such like questions form a catalogue of no small bulk and of no slight intricacy. They are the last subdivison of international law which remains to be noticed.

The conflict of laws attracted attention in France at an early period as an important branch of civil jurisprudence; and writers such as Burgundus, Rodenburg, and Boullenois had made familiar the distinction between the *personality* and *reality* of laws,

the former expression denoting such laws as were of universal application, and which concerned the condition and capacity of persons, the latter such laws as regarded property and things, the operation of which was confined to the country in which the property or things were situated. The conflict of laws which had arisen in France between the provinces of the same kingdom, operates in the North American continent between the states of the same Union, each of such states being an independent political society, and the laws of the one state having no intrinsic force or validity within the territory of the other. Thus the question of reconciliation has there assumed larger proportions, and it is not a matter of arrangement in the domestic policy of a nation; but the point to be decided is, what rule shall prevail, where there is a conflict of laws between independent sovereign states, and rights of a private nature have to be established between the members of different political communities. The frequent recurrence of such questions, and the important interests at stake, coupled with the serious mischief resulting from the absence of settled rules of obligation and right to govern the intercourse of mankind in such matters, has called forth several writers, amongst whom Mr. Justice Story stands preeminent, who has endeavoured most successfully, in his very able treatise on the Conflict of Laws, to give form and symmetry to the subject, and has discussed with great clearness and force the foundation, on which the administration of this branch of international jurisprudence rests. He has approved the principle which Huber sets forth in his third axiom: — that the rulers of every empire, from *comity*, admit that the laws of every people in force within its own territory ought

to have the same force everywhere, so far as they do not prejudice the powers or rights of other governments or of their citizens. "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicetur." (De Conflictu Legum, l. 1. tit. 3. § 2.) The rules which are to govern such questions are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return.

But every nation is at liberty to judge for itself to what extent it will recognise foreign laws, as they affect the state and condition of persons; and the obligation of the laws of one nation is not admitted, when they are contrary to the policy or prejudicial to the interests of another nation. In the silence of any positive rule repugnant to or restraining the operation of foreign laws, courts of justice everywhere expound and administer them, presuming the tacit adoption of them by their own government, and so acting upon them as a part of the voluntary Law of Nations. The doctrine of Mr. Justice Story in this respect is identical with the decisions of Lord Mansfield and Lord Stowell; and it has been followed by M. Fœlix, in his useful treatise on private international law, which may be studied with advantage as furnishing, from various European sources, a complement to Mr. Justice Story's Commentaries. (*Traité du Droit International Privé*, Paris, 1843.)

With regard to the rules which regulate the intercourse of nations, it may have occurred to many persons that there is a difficulty in discovering any

power to enforce them as law; and Mr. Austin, in his work on jurisprudence, seems disposed to banish the term "international law" from the vocabulary of jurisprudence, and to substitute "international morality." Law in general has been defined to be "the external freedom of the moral person." This law may be sanctioned and guaranteed by a superior authority; or it may derive its force from self-protection. The Jus Gentium is of the latter description. A nation associating itself to the great family of nations, thereby at once submits itself to the law or body of rules common to them all, and by which its international life is to be regulated. It cannot violate this law without exposing itself to the hazard of suspending its own international life, and of incurring the hostility of other nations, which may coalesce to punish it, or even to terminate its existence as an independent state. The motive, which induces each particular nation to observe this law, is founded upon its persuasion that other nations will observe towards it the same law. The Jus Gentium is founded upon reciprocity of will. "Reciprocity or mutuality" writes Sir J. Nicholl, "has always been considered as one of the leading principles of justice in questions arising between nation and nation. For example, by our municipal law this country established the principle of restitution upon payment of salvage, in cases of the recapture of British property from the enemy, notwithstanding *pernoctatio infra præsidia*, or any of those ancient general rules by which the property of the former owners was held to be extinguished; but the application of this rule to the property even of our allies in the late war was held to depend entirely upon its reciprocity. Thus, in the case of the St. Jago, a Spanish vessel (cited in the

Santa Cruz, 1 Rob. 63.), the property was condemned as prize to the recaptors, on the ground of its not being shown that restitution of the property of an ally, upon payment of salvage, was the rule of Spanish law; and in the case of the Santa Cruz itself, the same principle was applied with respect to Portugal; but upon that country afterwards engaging prospectively to restore, upon payment of salvage, British property after recapture by Portuguese subjects, the rule was made mutual."

The Law of Nations, in fact, has neither lawgiver nor supreme judge, since independent states acknowledge no superior human authority. Its organ and regulator is public opinion. Its supreme tribunal is history, which forms at once the rampart of justice, and the Nemesis by which injustice is avenged. Its sanction, or the obligation of all nations to respect it, results from the moral order of the universe, which will not suffer nations or individuals to be isolated from one another, but constantly tends to unite the whole family of mankind in one great harmonious society. Its province is to supply a secure foundation for building up the universal fellowship of the human race by the intercourse of nations and states; and its strength and efficacy is such, that no individual nation can lawfully prejudice it by any particular law or ordinance of its own. And whilst by observation and meditation we ascertain what rules of international conduct best promote the general happiness of mankind, by applying those rules as opportunities for carrying them out present themselves, we shall make progress towards that admirable order wherein God has disposed all laws, and to which order, to use the golden words of Hooker, "all things in heaven and earth do homage, both angels, and men, and creatures of

what condition soever, though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy."

The international jurist is by his vocation placed sentinel upon the outworks of this system; and no nobler end can be proposed to his ambition or sense of duty than to keep vigilant watch, ready to defend the weaker state against the aggressions of the more powerful, and to control the spirit of war and conquest, when it attempts to overthrow the established doctrines of public law; and when war has commenced, his province is to restrain the combatants within just limits, and to stay the arm of the belligerent when it would encroach upon the liberties of the neutral. Our lot has been cast in a period when the study of International Law commends itself at once to us, for Western Europe has taken up arms to avenge a great offence against the Law of Nations. No one can venture to say that such offences will altogether cease to be committed, even if the principles of that Law were more widely spread and more accurately understood; but thus much may be hazarded, that the more generally those principles shall be diffused, and the more deeply they shall take root, the more difficult will the wrong-doer find it to retain any portion of the sympathy of other nations. The apprehension of perfect isolation may in this way operate as a counterpoise to the suggestions of covetousness or the promptings of ambition, and the conscience of a nation, as of an individual, may ultimately become a LAW UNTO ITSELF.

THE END.

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